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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Kim Cramton,

10 Plaintiff,

11 v.

12 Grabbagreen Franchising LLC, et al.,

13 Defendants.
14

No. CV-17-04663-PHX-DWL

ORDER

15 Pending before the Court is a motion for reconsideration filed by Defendants Eat
16 Clean Holdings, LLC (“ECH”) and Keely Newman (“Keely”) (collectively,
17 “Defendants”). (Doc. 249.) For the following reasons, the motion will be denied.

18 **RELEVANT BACKGROUND**

19 Counts 6-10 of the operative complaint (Doc. 88) all arise from a phone call on
20 September 18, 2017 during which Keely allegedly told Plaintiff Kim Cramton (“Cramton”)
21 that a planned sale of Grabbagreen to Kahala had fallen through and that Kahala would not
22 be making any future acquisition offers. Cramton resigned soon after receiving this
23 information—a decision that caused her to forfeit her 18.6% ownership interest in ECH.
24 In fact, Kahala ended up acquiring Grabbagreen in March 2018 for \$2.675 million, and
25 Cramton contends that Keely’s statement during the phone call was false because Keely
26 knew Kahala remained interested in an acquisition. In Counts 6-10, Cramton seeks, under
27 a variety of tort and contract theories, the 18.6% portion of the Kahala acquisition proceeds
28 she would have received if she hadn’t left the company in September 2017.

1 On March 1, 2019, Defendants filed a motion for summary judgment on Counts 6-
2 10. (Doc. 143.)

3 On December 23, 2019, the Court issued a 73-page order resolving an array of
4 different motions, including Defendants' motion for summary judgment. (Doc. 247.) As
5 relevant here, the Court granted summary judgment to Defendants as to Count Six (breach
6 of the operating agreement) and Count Eight (tortious breach of the implied covenant) but
7 denied summary judgment as to Count Seven (non-tortious breach of the implied
8 covenant), Count Nine (negligent misrepresentation), and Count Ten (fraud). (*Id.* at 47-
9 61.)

10 DISCUSSION

11 Defendants ask the Court to reconsider the denial of summary judgment on Counts
12 Nine and Ten. They contend they are entitled to summary judgment on those counts
13 because (1) ECH has never distributed, to its members, the \$2.675 million in proceeds it
14 received from the Kahala acquisition, (2) the ECH Operating Agreement only entitles
15 members to share in distributions, and (3) Cramton therefore "has not established and
16 cannot establish any recoverable damages under Counts Nine and Ten." (Doc. 249 at 2, 4-
17 6.)

18 Motions for reconsideration should be granted only in rare circumstances.
19 *Defenders of Wildlife v. Browner*, 909 F. Supp. 1342, 1351 (D. Ariz. 1995). *See also Kona*
20 *Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (reconsideration is an
21 "extraordinary remedy" that is available only in "highly unusual circumstances") (citations
22 omitted). The Local Rules further state that a motion for reconsideration should be denied
23 "absent a showing of manifest error or a showing of new facts or legal authority that could
24 not have been brought to [the Court's] attention earlier with reasonable diligence." LRCiv.
25 7.2(g).

26 Reconsideration is not warranted here because Defendants are belatedly attempting
27 to raise an argument they could have raised—but, for whatever reason, chose not to raise—
28 in their summary judgment motion. As discussed in detail in the December 23, 2019 order,

1 Defendants' motion identified five reasons why they were purportedly entitled to summary
2 judgment on both Counts Nine and Ten,¹ two additional reasons why they were purportedly
3 entitled to summary judgment on Count Nine,² and one additional reason why they were
4 purportedly entitled to summary judgment on Count Ten.³ The argument they now wish
5 to advance was not one of those eight arguments.

6 Moreover, Defendants seemed to concede at points in their summary judgment
7 briefing that Cramton *had* sustained financial losses by resigning from the company in
8 September 2017 and thus missing out on the subsequent Kahala acquisition: "The evidence
9 demonstrates that Cramton impulsively resigned as . . . Manager of ECH, and took a
10 salaried job with Defendants' competitor. She then filed this lawsuit, asserting contrived
11 claims against Defendants *in an attempt to recover from her self-imposed losses.*" (Doc.
12 172 at 2, emphasis added.) Having failed to obtain summary judgment under this theory,
13 Defendants cannot advance a new summary judgment argument—based on old facts—
14 through the guise of a motion for reconsideration.⁴

15 Finally, Defendants also request, in the alternative, an order under 28 U.S.C. §
16 1292(b) certifying for interlocutory review a pair of issues concerning the applicability of

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18 ¹ Doc. 247 at 55 ["Defendants raise five summary judgment arguments that apply
19 equally to Counts Nine and Ten: (1) 'Keely's present-tense representation—that Kahala
20 rejected the deal then before it—is true'; (2) 'Keely made no representation about future
21 deals'; (3) 'Cramton's alleged reliance was not justified'; (4) Counts Nine and Ten are
22 barred by the ELR [economic loss rule]; and (5) because Cramton's resignation from GGS
23 on September 14, 2017 gave Keely the option, under Section 9.3 of the Operating
24 Agreement, to repurchase Cramton's shares for \$1, Cramton cannot have been damaged
25 by any subsequent misrepresentations. (Doc. 143 at 5, 13-17, 20-22.)"].)

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27 ² Doc. 247 at 58 ["Defendants move for summary judgment on Count Nine, the
28 negligent misrepresentation claim, on two additional grounds: (1) there was no duty owed
and (2) such a claim cannot be premised on a promise of future conduct. (Doc. 143 at 17-
18.)"].)

³ Doc. 247 at 60 ["Defendants move for summary judgment on Count Ten, the fraud
count, on the additional ground that Cramton hasn't identified any evidence that Keely
knew at the time of her challenged statement on September 18, 2017 that a future deal with
Kahala remained possible, so Cramton cannot establish Keely's fraudulent intent to
deceive. (Doc. 143 at 18-20.)"].)

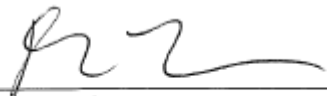
⁴ The Court acknowledges that Defendants' current counsel did not draft and file the
summary judgment motion. But a change in counsel does not authorize a party's successor
counsel to raise new arguments for the first time ten months after the summary judgment
deadline.

1 the economic loss rule (“ELR”). (Doc. 249 at 6-10.)

2 This request will be denied. *Villarreal v. Caremark LLC*, 85 F. Supp. 3d 1063, 1068
3 (D. Ariz. 2015) (“The decision to certify an order for interlocutory appeal is committed to
4 the sound discretion of the district court. As such, [e]ven when all three statutory criteria
5 are satisfied, district court judges have ‘unfettered discretion’ to deny certification.”)
6 (citation and internal quotation marks omitted). Certification is proper only when, *inter*
7 *alia*, “an immediate appeal from the order may materially advance the ultimate termination
8 of the litigation.” 28 U.S.C. § 1292(b). Although “neither § 1292(b)’s literal text nor
9 controlling precedent requires that the interlocutory appeal have a final, dispositive effect
10 on the litigation, only that it ‘may materially advance’ the litigation,” *Reese v. BP*
11 *Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011), the Court concludes the
12 material-advancement requirement isn’t satisfied here. The Final Pretrial Conference in
13 this case has already been set (Doc. 248) and the Court anticipates that trial will take place
14 sometime in mid-2020. Regardless of whether Defendants are correct about the
15 applicability of the ELR, Cramton will still be able to advance one contract-based claim
16 (Count Seven) seeking a portion of the Kahala proceeds and Cramton has also asserted a
17 minimum wage claim (Count Four) and a breach-of-contract claim (Count Five) that have
18 nothing to do with the issues Defendants wish to certify. Certification would be
19 inappropriate under these circumstances. *See, e.g., U.S. Rubber Co. v. Wright*, 359 F.2d
20 784, 785 (9th Cir. 1966) (“[Section 1292(b) is] to be used only in extraordinary cases where
21 decision of an interlocutory appeal might avoid protracted and expensive litigation. . . .
22 This unexceptional contract litigation presents, at most, nothing more than an uncertain
23 question of law relevant to only one of several causes of action alleged below, and no
24 disposition we might make of this appeal on its merits could materially affect the course of
25 the litigation in the district court.”); *White v. Nix*, 43 F.3d 374, 378-79 (8th Cir. 1994)
26 (“When litigation will be conducted in substantially the same manner regardless of our
27 decision, the appeal cannot be said to materially advance the ultimate termination of the
28 litigation.”).

1 Accordingly, **IT IS ORDERED** that Defendants' motion for reconsideration (Doc.
2 249) is **denied**.

3 Dated this 7th day of January, 2020.

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8 Dominic W. Lanza
9 United States District Judge
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